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No. 93

In the Supreme Court of the United States

OCTOBER TERM, 1929

ANITA H. COOPER, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION OF THE COURT BELOW

There was no written opinion by the Court of Claims. See page 13 of the Record.

JURISDICTION

The judgment of the Court of Claims was entered May 6, 1929. (R. 13.)

Petition for writ of certiorari was filed May 17, 1929. (R. 13.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925 (c. 229, 43 Stat. 936, 939).

STATEMENT

Petitioner seeks to recover $8,474.90 income taxes for the calendar year 1921, which she claims

were illegally assessed and collected from her under the following circumstances:

On November 1, 1921, the petitioner received as an absolute gift from Oscar Cooper, her husband, 380 shares of the capital stock of the New York County National Bank, which he had bought in 1918 for $113.50 a share, but which had a fair market value of $210 a share at the time petitioner received them. (Findings V, R. 12.)

On November 7, 1921, six days after these 380 shares were given to her, petitioner sold them for $210 a share, an increase of $36,670 over what they had cost her husband. (Findings V and VI, R. 12.)

On November 23, 1921, the Revenue Act of 1921 was enacted. (C. 136, 42 Stat. 227.) The applicable provisions of that Act are hereinafter set out under the caption "The Statute."

In her income-tax return for the calendar year 1921 (filed March 15, 1922), petitioner included in her taxable income the sum of $36,670 above mentioned, as required by Section 202 (a) (2) of the Revenue Act of 1921. By reason thereof she was required to pay $8,474.90 more in taxes than she would otherwise have been required to pay. (Findings VII, R. 12.)

QUESTIONS PRESENTED

1. Does the provision of the Revenue Act of 1921, that in the case of the sale of property acquired by gift after December 31, 1920, the basis for determining gain or loss shall be the same as that which it

would have in the hands of the donor, apply when the gift and the sale occurred prior to the enactment of that Act?

2. If so applied, is the provision constitutional?

THE STATUTE

Section 202 of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 229), which is a part of the Income Tax title of that act, provides, in part, as follows:

> SEC. 202 (a). That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—
>
> * * * * *
>
> (2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. * * * In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition.

Section 200 (1) of the Income Tax title provides that the first taxable year, to be called the taxable year 1921, shall be the calendar year 1921 or any fiscal year ending during the calendar year 1921. (42 Stat. 227, 228.)

Section 263 of the Income Tax title provides "That this title shall take effect as of January 1, 1921." (42 Stat. 271.)

Section 1400 (a) repeals the Income Tax title of the preceding Revenue Act as of January 1, 1921. (42 Stat. 320.)

ARGUMENT

There is no doubt of the power of Congress to tax as income to the donee the difference between the price paid by the donor and the price received by the donee, upon the sale of property acquired by gift. *Taft* v. *Bowers,* 278 U. S. 470. That case arose under the same section of the Revenue Act of 1921 (Section 202 (a) (2) as is here involved, and the only difference between it and the instant case is that here both the gift to and the sale by the donee took place before the enactment of the Act.

There seems to be no question as to the intention of Congress. While the Act did not become a law until November 23, 1921, Section 263 provided that "this title shall take effect as of January 1, 1921," and it applied to incomes received during the entire calendar year. By Section 202 (a) (2), the question whether the basis of determining gain or loss from the sale of property acquired by gift was to be "that which it would have in the hands of the donor" or "the fair market price or value of such property at the time of such acquisition," was expressly made to depend on whether the property was so acquired after or before December 31, 1920. We submit that there is no reasonable basis for a

construction of the Act that Congress did not intend the former basis to be applied in the case of property acquired by gift between December 31, 1920, and November 23, 1921, but sold before the latter date, and that such cases as *Shwab* v. *Doyle,* 258 U. S. 529, and *Levy* v. *Wardell,* 258 U. S. 542, cited by petitioner, have no application.

The question of constitutionality is therefore squarely presented.

The power of Congress to enact income-tax laws which are retroactive over limited periods has been so long recognized that it should not now be questioned. Instances of the retroactive imposition of such laws, as well as of other taxing statutes, are reviewed in the dissenting opinion of Mr. Justice Brandeis in *Untermyer* v. *Anderson,* 276 U. S. 440, 447.

Such a statute may not be held unconstitutional merely because it is retroactive, but only in case it is so arbitrary and capricious that its enforcement would lead to confiscation and offend the Fifth Amendment. *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Blodgett* v. *Holden,* 275 U. S. 142, 147, 276 U. S. 594; *Untermyer* v. *Anderson, supra.*

We submit that there is nothing arbitrary or capricious or confiscatory in the retroactivity of the tax required by Section 202 (a) (2). The three cases above cited, which are relied on by petitioner, are plainly distinguishable. The requirement in an estate tax law of the inclusion in the gross estate of a decedent of property transferred by him long

before its passage (*Nichols* v. *Coolidge, supra*), or a retroactive gift tax imposed on the act of making the gift and to be paid by the *donor* (*Blodgett* v. *Holden, supra; Untermyer* v. *Anderson, supra*) are wholly different from the retroactive imposition of an income tax to be paid by the *donee* on gain actually realized through the sale of property, such as is here involved. That gain is income. If the donor had sold the property and realized the income, Congress would have had power to tax him retroactively upon it. Here the donee received the income, and the power of Congress to tax her upon it has been fully upheld. (*Taft* v. *Bowers, supra.*) We do not believe that the fact that the taxable income was received by her before the enactment of the statute requires a different decision.

CONCLUSION

In view of the very recent and comprehensive exposition by this Court in the cases above cited of the principles which in our view support the decision of the court below in the instant case, it is submitted that review of that decision on certiorari is not required.

Respectfully submitted.

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